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Issue Date: 02 June 2006

Case No.: 2003-LHC-1529

OWCP No. 07-137531

IN THE MATTER OF

MATTIE N. CAMPBELL,
Claimant

vs.

ADM/GROWMARK RIVER SYSTEM, INC.,
Employer

DECISION & ORDER ON REMAND

BACKGROUND

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act),[1] brought by Mattie Campbell (Claimant) against ADM/Growmark River System, Inc. (Employer). Both parties were represented by counsel.

On 10 Sep 04, a hearing was held at which the parties called witnesses, examined and cross-examined those witnesses, offered exhibits, and made arguments. Post-hearing briefs were submitted by both parties. There was no dispute that Claimant was injured in the course and scope of covered employment and that she was unable to return to her original job. The issue submitted for adjudication was the extent of Claimant's disability and her post-injury earning capacity.

The 04 Jan 05 Decision and Order found that: Claimant was injured on 15 Aug 95 and had an average weekly wage (AWW) of $696.90. She originally reached maximum medical improvement (MMI) on 08 Nov 95. Her condition deteriorated until she was unable to do her original job on 27 Oct 96. She was assigned to duties which were

[1] 33 U.S.C. § 901 *et seq*.

sheltered employment until 24 Nov 96, at which time employer offered her suitable alternative employment (SAE) at its facility with a pay rate of $8.34 per hour and overtime hours. She continued in that capacity until March of 2003 when she had additional surgery to treat her job-related injury and was no longer able to work overtime. On 30 Apr 04, she was terminated for economic reasons.

The Decision and Order concluded that Claimant was entitled to temporary total disability for the period during which she was given sheltered employment and permanent partial disability starting with the date that Employer provided her suitable alternative employment. It also ruled that her partial disability benefits should be based on a post injury wage capacity of $8.34 per hour, the rate applicable at the time Claimant could no longer perform her original job. Finally, it concluded that having established almost eight years of suitable alternative employment (albeit through a job provided by Employer), which ended for reasons unrelated to Claimant's injury, Employer had satisfied its burden and need not establish other suitable alternative employment.

On appeal, the Benefits Review Board affirmed the findings of temporary total disability and permanent partial disability though 30 Apr 04, the date Claimant was terminated by Employer. However, it held that when suitable alternative employment is provided by the employer, the employer remains liable (in the absence of claimant misconduct) for establishing other subsequent suitable alternative employment in the event it can no longer provide the claimant with that suitable alternative employment. Accordingly, the Board remanded the case for a determination as to whether the record establishes any other suitable alternative employment as of 30 Apr 04. The Board also remanded the case for a calculation of Claimant's post-injury earning capacity as of the date of her injury, rather than the date Claimant was no longer able to work in her original job.

The parties submitted post remand briefs.

POSITIONS OF THE PARTIES

Appropriate Post-Injury Wage Rate

Claimant argues that there is no evidence of what the specialized guard/clerk position would have paid in August of 1995 and urges the application of the discount rate as set by the change in the National Average Weekly Wage.[2] Claimant also submits for consideration the fact that after her second surgery, Claimant was no longer able to work overtime and her earning capacity decreased accordingly.

[2] *Richardson v. Gen. Dynamics Corp.*, 19 BRBS 48 (1986).

Employer responds that there is sufficient evidence in the record to support a finding that $8.34 was the wage in August of 1995 and there is no need to resort to the *Richardson* calculation.

Post April 2004 Suitable Alternative Employment

Claimant argues that the record fails to establish any other suitable alternative employment and she is presumed totally disabled as of her release from Employer. Employer counters that the record contains sufficient evidence to find that it established suitable alternative employment and that Claimant failed to seek out employment.

DISCUSSION

Appropriate Post Injury Wage Rate Through 30 Apr 04

As Claimant points out, there is no evidence of what the pay would have been for Claimant's hybrid guard position in August of 1995, since the job, as subsequently performed by Claimant, did not exist at that time. Employer's vocational expert testified that there were comparable guard positions in the area that paid an hourly wage commensurate to $8.34, ranging from $7.00 to $9.00. She based her conclusion on data obtained from specific firms. However, the Bayou State Security ($7.00 to $9.00) and Rollo ($6.00 to $8.00) wage information was based on a period from 1995 to 1998 and the Guardmark wage ($8.00) was from 1997. She also testified that the Hilton paid $7.05, plus $0.75 after six months and that a general median wage would be $7.25. While Employer's brief accurately notes that Claimant's vocational expert did not deny that $8.34 was a reasonable 1995 wage for Claimant's work, it is also true that she did not concede that fact.

Given the fact that the suitable alternative employment for the period in question was a hybrid job provided by Employer and the absence of any substantial evidence of what that Employer would have paid similar positions at the time of injury in August 1995, the most appropriate means of determining Claimant's post-injury earning capacity at the time of her accident is to apply the *Richardson* calculation.

Claimant's November 1996 wage of $8.34 must be adjusted to reflect an August 1995 injury date. An August 1995 wage would be adjusted for annual inflation on 1 Oct 95 at 2.83% and again on 1 Oct 96 at 2.38% to reach a corresponding November 1996 wage.[3] Retrograde application of those same factors yields: $8.34*97.62% or $8.14 and $8.14*97.17% or $7.91. Accordingly, Claimant's hourly earning capacity adjusted to August of 1995 is $7.91.

However, her weekly earning capacity must also take into account her overtime. Claimant testified that until her second surgery she worked 10 hours of overtime per week. Employer's administrative assistant testified that Claimant was paid time and a half for overtime. Consequently, her initial weekly earning capacity adjusted to August of 1995 was 40 plus 15 (ten hours at time and a half) or 55 x $7.91. Her weekly post injury earning capacity through 16 Oct 02 was $435.05. After 16 Oct 02 that weekly earning capacity (adjusted for the August of 1995 wage rate) decreased to 40 x $7.91 or $316.40.

Post 30 Apr 04 Suitable Alternative Employment

In accordance with the Board's ruling, once Employer no longer provided suitable alternative employment to Claimant on 30 Apr 04, she became presumptively totally disabled until Employer met its burden of showing other suitable alternative employment. The record is clear that Claimant was able to do security guard work as long as it did not include lifting more than ten pounds.

Employer argues that the testimony of its vocational expert was sufficient to establish the availability of such jobs. However, the expert prefaced her testimony by stating that she had been retained to review the job Claimant was performing and determine the wages of security guards in 1995 and 1996. She testified that during that time frame, in the normal course of her business, she had been engaged in looking for jobs and evaluating wages. She described the security guard employment and wage environment that existed at that time. She did say that Claimant is qualified to be a security guard and could be an attractive candidate to hire. When asked if there were still security guard jobs that do not require lifting more than ten pounds, she replied that there were. She also affirmed that there were jobs in the area commensurate with Claimant's training, experience, and physical restrictions that Claimant could perform.

[3] In her brief Claimant suggests also applying the 3.06% adjustment effective 1 Oct 94. Employer did not address this issue as it argued that the calculation should not be made at all. I find no reason to apply three years of inflation adjustments over a 15 month period.

Employer also suggests that Claimant's vocational expert's testimony supports its position. The expert agreed that Claimant would be an attractive candidate for a security guard position and could expect to earn more than an entry level wage because of her experience.

It may be very possible and even likely that there were suitable alternative employment jobs available to Claimant in the form of security guard positions not requiring lifting more than ten pounds. However, because of the context in which the vocational experts testified, such a conclusion would be based on generalized asides rather than specific testimony. Whether suitable alternative employment existed on 1 May 04 was not directly addressed by the experts. Although that is not required, I still find that the quantity and quality of evidence offered by Employer was insufficient to establish either general employment opportunities or a single job Claimant would have a reasonable likelihood of obtaining under appropriate circumstances.[4] Therefore, any question of whether Claimant diligently sought employment is moot. Employer failed to carry its burden and Claimant remains totally disabled.

DECISION & ORDER

Consistent with the above discussion and in response to the Board's order to remand, I make the following specific amended findings.

1. Claimant's post-injury weekly earning capacity from 25 Nov 96 to 23 Mar 03 was $435.05.

2. Claimant's post-injury weekly earning capacity from 24 Mar 03 to 30 Apr 04 was $316.40.

3. Claimant's average weekly wage was $696.90

4. Claimant has been totally disabled from 1 May 04 to present and continuing.

and enter the following amended orders:

1. Employer shall pay Claimant compensation for permanent partial disability from 25 Nov 96 to 23 Mar 03 based on an average weekly wage of $696.90 and a post-injury weekly earning capacity of $435.05.

[4] *P & M Crane Co. V. Hayes*, 930 F.2d 424 (5thCir. 1991); *Diosdado v. John Bludworth Marine Inc.*, No. 93-5422 (Sept. 19, 1994) (5thCir. 1994) (unpublished).

2. Employer shall pay Claimant compensation for permanent partial disability from 24 Mar 03 to 30 Apr 04 based on an average weekly wage of $696.90 and a post-injury weekly earning capacity of $316.40.

3. Employer shall pay Claimant compensation for permanent total disability from 1 May 04 to present and continuing based on an average weekly wage of $696.90.

4. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

In all other respects the original findings and order remain unchanged.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge